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9
10 **IN THE UNITED STATES DISTRICT COURT**
11
12 **DISTRICT OF NEVADA**

13 THOMAS F. ("TIM") FODOR,

14 Plaintiff,

15 **Case No. 3:10-cv-798-RCJ-VPC**

16 vs.

17 JOHN DOE, a fictitious Defendant a.k.a.
18 TAZMANIAN353 a.k.a. TAZ whose identity is
19 not verified; PHILLIP MAURICE HICKS
20 a.k.a. MARTY HICKS a.k.a. TAZMANIAN353
21 a.k.a. TAZ; DOES II through XX, inclusive,
22 BLACK & WHITE ENTITIES I through XX,
inclusive,

23 Defendants.

24 /

25 **MOTION FOR LEAVE TO CONDUCT THIRD PARTY DISCOVERY**

26 Plaintiff THOMAS F. ("Tim") FODOR moves to conduct limited third party
27 discovery sufficiently to determine the true identity of the individual defendant JOHN
28 DOE a.k.a. Tazmanian353 ("Tazmanian"), to allow Plaintiff to amend his Complaint to
include the individual's true identity as the Defendant herein, to accomplish service of
process on him in accordance with the Federal Rules of Civil Procedure.

29
30 RESPECTFULLY, this 14th day of March 2011

31
32 LAW OFFICE OF GORDON M. COWAN

33 /S/

34
35 GORDON M. COWAN, attorney for
36 Plaintiff TIM FODOR

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BACKGROUND

Mr. Fodor

Mr. Fodor is a talented oil and gas geologist whose expertise involves discovering oil and gas reserves that have never been discovered previously. Until the libelous posting the subject of which gives rise to this suit, Mr. Fodor enjoyed a stellar reputation.

Mr. Fodor employs the most up-to-date geo-science when exploring for undiscovered oil and gas. Because this process is involved and expensive, Mr. Fodor must raise capital to fund those exploration and discovery efforts.

To raise capital Mr. Fodor relies nearly entirely on the financial world including financial institutions from which Mr. Fodor has, through many years of nurturing, developed into many successful business funding relationships.

Mr. Fodor's achievement in maintaining important financial relationships is attributed to his reputation as an honest, morally sound and trustworthy individual and also to his reputation in having been successful in his exploratory methods. Without a "squeaky clean" reputation based in honesty, integrity, moral soundness and trust, Mr. Fodor would lose his ability to raise capital and attract partnerships to fund his exploration efforts. Without a sound reputation based in honesty, integrity, moral soundness and trust, particularly in the high risk endeavors involving oil and gas exploration, Mr. Fodor would be "out of business" in short order. One's reputation for honesty, integrity, moral soundness and trust is an absolute prerequisite among those desiring to finance the type exploratory efforts in which Mr. Fodor engages.

Tazmanian's Offensive Blog Posting

Plaintiff recently became aware of a blog¹ posting dated December 23, 2008,

¹ A “blog,” short for “web log,” is a web page or web posting on the internet that serves as a publicly accessible and publicly published, personal journal of individuals who desire to post information and messages on the internet. Those who “blog” are sometimes referred to as “bloggers.”

1 posted on "Blogspot.com"² by an individual known only as Tazmanian.

2 The subject of Tazmanian's blog posting implicates Mr. Paul Staub, a
 3 Pennsylvania attorney, in criminal activity to defraud investors. The blog posting
 4 references, "serious crimes," "scammed ... investors," a "cover up," that, "a lot of
 5 money was stolen," a, "fraud," and it characterizes Mr. Staub as "the con of con artists."
 6 The blog posting identifies a trial date for Mr. Staub for his criminal misgivings.

7 Although Tazmanian's focus was directed toward Mr. Staub, the blog posting
 8 didn't stop there. For some reason not known to Mr. Fodor, Tazmanian chose to
 9 expand his rant against Mr. Fodor by dragging Mr. Fodor's name into the mix of alleged
 10 criminal activity when denigrating Mr. Staub.

11 In identifying Mr. Fodor by name in three instances within the same blog posting,
 12 Tazmanian falsely and recklessly implicates Mr. Fodor as a criminal aider and abettor of
 13 Mr. Staub's criminal fraud toward investors.

14 In an offensive statement that is offered as fact, not "opinion," Tazmanian falsely
 15 and recklessly states that Mr. Fodor, "has been involved from the beginning by aiding
 16 Paul Staub, Jr. thus perpetuating the fraud."³ Tazmanian concludes by stating, "[A]ny
 17 information you have on *these individuals* would be greatly appreciated." (Emphasis).
 18 The statement to "these individuals" clearly references Mr. Fodor a fourth time
 19 (although not by name), further implicating Mr. Fodor into Staub's criminal activities.

20 The entire posting with Mr. Fodor's name omitted, reads as follows:

21 Looking for comments back from others that have been
 22 scammed by Paul Staub, Jr. He came looking for investors
 23 in oil exploration projects with ***[material intentionally***

24 ² "Blogspot.com" is a weblog or blog hosting service or blog publishing service
 25 that facilitates individuals or bloggers who desire to publish their blogs on the internet.

26 ³ Tazmanian's statements are found verbatim by logging onto the internet at
 27 www.google.com. If one searches "Tim Fodor," or "Thomas F. Fodor," the very first
 28 search result listed is the offensive blog posting by Tazmanian. Choosing the listed
 item would bring the inquirer to the heretofore mentioned blog posting.

1 **omitted]** of Nevada. We later learned that Paul Staub, Jr.
 2 has been charged with 5 serious crimes in Pennsylvania and
 3 his trial date is February 19, 2009. It is plastered in all the
 4 local news in the Pittsburgh area if you simply Google his
 5 name. Paul made his situation much worse for himself by
 6 using investor money in shallow attempts to cover up his
 7 crimes. Luckily he got caught but not until a lot of money
 8 was stolen and time wasted. **[material intentionally**
 9 **omitted]** has been involved from the beginning by aiding
 10 Paul Staub, Jr. thus perpetuating the fraud. We have been
 11 told that **[material intentionally omitted]** is related to Paul
 12 Staub and we are trying to find out those details as well. If
 13 you are approached by Paul Staub, please remember that
 14 he is the con of con artists and is an attorney, at least for
 15 now. Any information you have on these individuals would
 16 be greatly appreciated.

17 (From web posting, "www.tazmanian353.blogspot.com") (Emphasis).

18 The devastating issue for Mr. Fodor is this: Tazmanian's blog posting is
 19 published in a medium accessed by Billions of users daily.⁴ The offensive blog posting
 20 remains the first listed item of results when one searches Mr. Fodor's name on
 21 Google's search engine.

22 It is this very blog posting by Tazmanian353, which falsely accuses Mr. Fodor in
 23 criminal and dishonest activity, that precipitates this lawsuit.

24

25

26

27

28 ⁴ Without taking into account other "web search engines," Google's "web search engine" alone receives an estimated 1.5 billion "hits" or visits per day.

1 **All Reasonable Efforts to Locate and Identify**
 2 **the Defendant have been Exhausted**

3 *Tazmanian's Anonymity Hampers the Search of his/her Identity*

4 The offensive message is posted anonymously. There is no contact information
 5 accompanying the blog posting relative to the true identity of the individual who
 6 authored and published the offensive blog posting. Only Tazmanian353 is referenced.

7 *Google, Inc., Operates Blogspot.com and Refuses*
 8 *to Respond to Mr. Fodor's Request for Help*

9 “Blogspot.com” is managed, operated, run or otherwise controlled by Google,
 10 Inc. (“Google”). “Blogspot” and “blogspot.com” are brand names, service names, trade
 11 names, trademarks or service marks currently owned by Google. See “Blogger Terms
 12 of Service,” p. 4, paragraph 8, “Publicity,” at **Exhibit “1”** attached.

13 Plaintiff sought informal help from Google in an attempt at removing the
 14 offensive blog. Mr. Fodor alternatively sought from Google, the identity of Tazmanian.
 15 See correspondence to Google at **Exhibit “2”** attached. Google chooses to refuse Mr.
 16 Fodor’s request for help by simply ignoring him.

17 Mr. Fodor even offered to provide Google his personal information including a
 18 credit check, personal and business references, background check, bank references or
 19 whatever Google might deem necessary from him to assure Google of Mr. Fodor’s
 20 otherwise stellar business background and reputation, to cause removal of the posting
 21 or to cause Google to provide information leading to Tazmanian’s identity. See
 22 correspondence to Google at **Exhibit “2”** attached. Google chose not to respond.

23

24 *Mr. Fodor Sought to Confirm the Identity of Tazmanian through Marty Hicks*

25 Plaintiff has information not yet verified, that Tazmanian353 may be one-and-
 26 the-same as a Mr. Marty Hicks or Phillip Maurice Hicks. Mr. Hicks resides in South
 27 Carolina. Mr. Hicks is a named Defendant herein.

28 The undersigned sent letters (contents of which are at **Exhibit “3”** attached) to

1 Mr. Hicks where internet sources indicate Mr Hicks does business and accepts his mail.

2 The addresses obtained from the internet for Mr. Hicks are as follows:

3 Marty Hicks
4 CFO Bridge LLC
5 HH Venture Capital LLC
6 295 Seven Farms Dr., Suite 211
7 Daniel Island, SC 29464

6 Marty Hicks
7 HH Venture Capital LLC
8 P.O. Box 681
9 Mt. Pleasant, SC 29465

10 The letter sent to P.O. Box 681 in Mt. Pleasant, South Carolina, was returned
11 as undeliverable. See copy of returned envelope at **Exhibit “4”** attached. The
12 letter addressed to Mr. Hicks at 295 Seven Farms Dr., Suite 211 in Daniel Island,
13 was not returned. However, Plaintiff has since been advised by others who sought
14 to serve Mr. Hicks with process (for his other libelous internet postings), that the
15 address, 295 Seven Farms Dr., Suite 211 in Daniel Island, South Carolina, is in
16 actuality, a private post office box, not a true physical location of a working office as
17 the address would otherwise indicate. See Declaration of Jackson Bucher at
18 **Exhibit “5”** attached.

19 The letter to Mr. Hicks from the undersigned (**Exhibit “3”**) seeks to confirm
20 his identity as Tazmanian353. Apparently choosing to avoid a response to the
21 inquiry, Mr. Hicks has neither acknowledged nor denounced his identity as
22 Tazmanian353.

23 Mr. Fodor's prior counsel in Pennsylvania, William Knestrick, Esq., attempted
24 to contact Mr. Hicks. Attorney Knestrick, also believing Hicks may be one-and-the-
25 same as Tazmanian353, sent a letter to Hicks via the U.S. mail with first class
26 postage prepaid, to the address, 295 Seven Farms Dr., Suite 211, Daniel Island, SC
27 29464. This letter was never returned. Knestrick never received a response.

28 Attorney Knestrick also retained a process server who had become aware of
29 Mr. Hicks' residential location. The process server, Mr. Jackson Bucher, knocked on

1 the door at an address in Mt. Pleasant, South Carolina where Mr. Hicks was located,
 2 to deliver Knestricks letter. No one answered although there were clear indication
 3 that someone was within the residence. Mr. Jackson Bucher taped Knestricks letter
 4 (**Exhibit “6”**) to the door of Hicks’ residence. Mr. Bucher then parked some distance
 5 away with a clear view of the residence, to observe what might next transpire.
 6 Following some lengthy period, Mr. Bucher observed the door to the residence open
 7 and a gentleman believed to be Marty Hicks, stepped out, removed the letter that
 8 Bucher had taped to the door, and disappeared back inside the residence with
 9 Knestricks letter in hand. Attorney Knestricks never heard from Hicks. Knestricks
 10 never linked the identity of Tazmanian353 to Hicks.⁵

11 The effort of Mr. Jackson Bucher to provide Hicks with Knestricks letter
 12 (**Exhibit “6”**) is described in **Exhibit “5.”**

13
 14 Marty Hicks Evaded Service of Process and also Refused to
Attend his Deposition in Another Internet Libel Matter in
Which Hicks is Referred to as the Defendant, Tazmanian353

15 Hicks and Tazmanian353 are target defendants in another internet libel case.
 16 Mr. Jackson Bucher also attempted to serve Mr. Hicks with the Summons and
 17 Complaint of an internet libel case pending against Hicks in South Carolina as,
 18 *Revolutons Medical Corporation, Rondaldo L. Wheet, and Thomas O’Brien, Plaintiffs,*
 19 *vs. Philip Maurice Hicks a.k.a Marty Hicks, a.k.a tazmanian353, a.k.a. Taz,*
 20 *Defendant* (Case 2010-CP-10-7659, Court of Common Pleas, Ninth Judicial District,
 21 County of Charleston, State of South Carolina) (*Revolutions Medical*). See **Exhibit**
 22 **“8”**. This Complaint inferentially identifies Mr. Hicks as Tazmanian353. The
 23 *Revolutions Medical* Complaint alleges that Tazmanian353 posted libelous or
 24 disparaging material about Revolutions Medical Corporation and its principals, on the

25
 26
 27 ⁵ Mr. Kinestricks was unavailable for his Declaration before this brief was filed, to
 28 outline his efforts to locate Tazmanian353 and Marty Hicks. Plaintiff intends to
 supplement this Motion with Knestricks Declaration if/when it becomes available.

1 internet through blogs at RagingBull.com ("Raging Bull") and Yahoo! Finance.

2 When Jackson Bucher attempted to serve Mr. Hicks with the Summons and
3 Complaint in *Revolutions Medical*, Hicks was at the time, within the same residence
4 where Jackson Bucher observed Hicks previously (when attempting to deliver
5 Knestrick's letter). Once again, despite clear indication of Hick's presence in the
6 home, Hicks refused to acknowledge Jackson Bucher's presence at the front door.

7 Jackson Bucher then engaged the assistance of the local County (South
8 Carolina) Sheriff's Office. Their Deputy caused Hicks to accept the *Revolutions*
9 *Medical* Summons and Complaint. The Deputy served the same individual at the
10 same residence where Jackson Bucher made his attempts of service previously.

11 See **Exhibit "5."**

12

13 *The Revolutions Medical Complaint Identifies Marty Hicks*
14 *as Tazmanian353 in an Internet Libel Matter; Hicks Neither*
Admits Nor Denies He Is Tazmanian353

15 The *Revolutions Medical* complaint identifies Hicks as Tazmanian353. The
16 *Revolutions Medical* Complaint alleges that Hicks a.k.a. Tazmanian353, published
17 libelous material on the internet, targeting a medical supply company and its
18 principals. *Revolutions Medical* Complaint at **Exhibit "8."**

19 In answering the *Revolutions Medical* suit, Mr. Hicks neither admits nor denies
20 his identity as tazmanian353. See Hicks' "response" to the Revolutions lawsuit at
21 **Exhibit "9"** attached.

22 Mr. Stephen Bucher, attorney for Plaintiffs in *Revolutions Medical*, arranged
23 for Mr. Hicks' deposition which would have occurred two weeks past, on February 24,
24 2011. Mr. Hicks, defending *pro se*, did not appear for his scheduled deposition.
25 See, Declaration of attorney Stephen Bucher at **Exhibit "7"** attached. Rather than
26 participate at the scheduled deposition, Hicks sent a blistering commentary to the
27 court denigrating the legal process and objecting to his deposition. Hicks' letter to
28 the court in *Revolutions Medical* is at **Exhibit "10"** attached. Resultantly, the

1 Plaintiffs in *Revolutions Medical* and their attorney Stephen Bucher have yet to
 2 confirm Hicks' identity as one-and-the-same as Tazmanian353.

3 In summary, even those who are in close geographical proximity to Hicks,
 4 must endure repeated difficulties (and offensive gestures) when seeking to make
 5 contact with Hicks or to gain his attention in usual communication channels.

6

7 Mr. Hicks has thus far, Evaded Service of Process in this Matter

8 Jackson Bucher, the same process server as was used by Mr. Fodor's
 9 Pennsylvania counsel (Knestrick), and who was retained by attorney Stephen Bucher
 10 to serve Hicks with the *Revolutions Medical* suit, is retained to serve Hicks in this
 11 case. Hicks has thus far, evaded young Jackson Bucher's attempts at service.

12 In the latest attempt to serve Hicks, occurring the morning of March 10, 2011,
 13 Jackson Bucher waited for Hicks some distance from an office building where Hicks
 14 apparently conducts "business." When Hicks arrived in his car, Jackson Bucher
 15 began making his way toward Hicks. Hicks spotted Bucher with papers in hand and
 16 retreated to his car. By the time Jackson Bucher made it to Hicks' car, Hicks was
 17 driving off while clearly directing an ungentlemanly hand gesture toward young
 18 Jackson Bucher. See Jackson Bucher's Declaration, **Exhibit "5."**

19 In many North American cultures, Hicks offensive hand gesture is understood
 20 as "flipping off" someone, or giving someone "the finger" or the "highway salute," or
 21 "the bird." The gesture non-verbally communicates the expressive message which,
 22 in its most polite terms, means, "up yours."

23

24 Tazmanian's True Identity Remains Elusive

25 Mr. Fodor's numerous attempts at confirming Tazmanian's identity with Hicks
 26 (*if* Hicks is one-and-the-same as Tazmanian) have thus far, failed. Mr. Fodor has
 27 with two separate counsel, with two separate approaches, and with formal suit thus
 28 far, attempted to open lines of communication with Hicks without success.

1 Mr. Fodor sought informal assistance from Google to obtain Tazmanian353's
 2 true identity. Google has chosen thus far, to ignore Mr. Fodor's call for help.

3 **Civil Discovery is Likely to Enable Mr. Fodor to Identify
 4 the Defendant Who Posted the Libelous Material**

5 With third party discovery, Plaintiff believes he would be able to obtain
 6 information sufficiently to identify those responsible for publishing the offensive blog
 7 posting.

8 Plaintiff believes Google is capable of providing the individual's name, contact
 9 information, IP address and related information who registered with Blogspot as
 10 "Tazmanian353."

11 The *Revolutions Medical* Complaint identifies "Tazmanian353" as the blogger
 12 who posted defamatory material about Revolutions Medical Corporation on the
 13 internet message board, Raging Bull. Plaintiff believes Raging Bull may potentially
 14 be capable of providing the individual's name, contact information, IP address and
 15 related information, who registered there as "Tazmanian353."

16 Mr. Fodor's third party discovery seeks merely to put a face and real identity
 17 with the blogger known only as Tazmanian353.

18 The purpose in seeking Tazmanian's identity is legitimate where Mr. Fodor
 19 needs a *real person* to serve with process in accordance with the Federal Rules of
 20 Civil Procedure. Without the *real person*, Mr. Fodor has no ability to seek justice for
 21 the harm being caused him. Without the *real person*, this case fails.

22 **DISCUSSION**

23 The practice of suing Doe defendants is generally disfavored in the Ninth
 24 Circuit. However, in cases where the identity of the alleged defendant is not known
 25 prior to the filing of a lawsuit, "the plaintiff should be given an opportunity through
 26 discovery to identify the unknown defendants, unless it is clear that discovery would
 27 not uncover the identities, or that the complaint would be dismissed on other
 28 grounds." *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (quoting

Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)).

When an anonymous Internet user is a *target defendant*, limited discovery to identify the defendant may be permitted where a plaintiff:

- (1) identifies the missing party with sufficient specificity such that the court can determine that defendant is a real person or entity who could be sued in federal court;
- (2) identifies all previous steps taken to locate the elusive defendant;
- (3) establishes to the court's satisfaction that the lawsuit against the defendant could withstand a motion to dismiss; and
- (4) states reasons justifying the specific discovery requested, and identifies a limited number of persons or entities upon whom discovery might be served and for which there is a reasonable likelihood that the discovery will lead to identifying information about defendant that would make service of process possible.

⁶ *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) (“*Columbia*”).

⁶ The Ninth Circuit Court of Appeals (“Ninth Circuit”) recently visited a Nevada District Court matter on cross writs of mandamus. The writs involved the revelation of the true identities of five anonymous speakers who disparaged a party’s business services. Although denying the writs for their failure to seek extraordinary relief, the Ninth Circuit provided some guidance pertaining to the anonymity of witnesses in discovery. The Ninth Circuit did not however, address the instance where anonymous speakers are party defendants whose participation is vital to the core of pending litigation, the absence of whom would most likely cause the demise of the case.

In re Anonymous Online Speakers, 2011 WL 61635 (9th Cir. Docket No. 09-71265, Jan. 7, 2011) involved the district court's ordering the revelation of the true identities of three (of five) anonymous witnesses who disparaged the business services of one of the parties. Cross writs ensued. The Ninth Circuit found the district court's bar to disclosure of the speakers' identities, too stringent, "to the highest level," and that the court used a standard that "extends too far," given the context of the type speech at issue. The circuit court suggests that the, "nature of the speech should be a driving force in choosing [such] a standard." The Ninth Circuit found no apparent error where the district court ordered the parties to reveal the identities of three of the anonymous speakers despite the stringent standard the court employed.

Where the *Anonymous Online Speakers* case involved *non-party* witnesses

1 **Mr. Fodor has Taken Reasonable Steps to Both Avoid**
 2 **this Suit and to Determine Tazmanian's True Identity**

3 Before delving into the *Columbia* inquiry, Plaintiff sought to avoid the court's
 4 ultimate intervention.

5 The letter sent to Mr. Hicks (**Exhibit "3"**), demonstrates clearly, Mr. Fodor's
 6 attempt at offering the "olive branch" to informally and discretely resolve this matter.
 7 This offer of "peace," has been made futile by Mr. Hicks' choice to avoid those who
 8 seek to contact him.

9 Mr. Fodor's attempts at seeking assistance from Google have likewise been
 10 made futile. Google simply chooses to ignore Mr. Fodor's request for help.

11 Mr. Fodor's attempts at contacting Mr. Hicks directly to determine (or dispel)
 12 his identity as Tazmanian353, have been unsuccessful. Others who sought
 13 confirmation of Mr. Hicks' identity as Tazmanian353 have likewise been thwarted in
 14 their attempts to do so, the *Revolutions Lawsuit* being the example.

15

16 **Tazmanian is a Real Person, a Named Defendant and a Necessary Party**

17 Plaintiff believes Tazmanian is a real person whose true identity remains
 18 concealed. Plaintiff is not aware of a method that could cause such a posting to be
 19 authored artificially, without human interaction or without the human thought process.

20 Tazmanian353 *could* be Mr. Hicks although efforts thus far to discover the
 21 connection have been thwarted.

22 Tazmanian is a named defendant and necessary party in this case. Plaintiff
 23 does not seek revelation of the anonymity of a non-essential person to the case, or to
 24 a mere anonymous non-party witness. Plaintiff seeks only modest information,

25

26 rather than the true identity of a Defendant known only by an alias or fictitious name,
 27 Plaintiff believes the *Columbia Ins. Co.* decision is instructive in determining when
 28 discovery is appropriate to determining the true identity of a necessary, target
 defendant.

1 sufficiently to identify the author/publisher of the libelous blog posting.

2 Tazmanian is a party herein whose contact information is essential to allow
3 Plaintiff to serve her/him with process in accordance with the Federal Rules of Civil
4 Procedure, specifically Fed.R.Civ.P. 4(e), 4(m). Service of process on the “real
5 person” who is one-and-the-same as Tazmanian353, is essential to the survival of
6 this case should Hicks not be Tazmanian353.

7

8 **Mr. Fodor's Complaint is able to Withstand a Motion to Dismiss**

9 The blog posting's written factual statements that Mr. Fodor had been involved
10 with Staub's fraudulent investor rip-off scheme, is an unprivileged, false and
11 defamatory statement of fact (not opinion) which directly impugns Mr. Fodor's
12 personal and professional good character, moral fiber and honesty. The statement
13 denigrates Mr. Fodor as an individual in his business endeavors. The statement is
14 harmful particularly where Mr. Fodor's business relies on raising capital from
15 investors or financial institutions for oil and gas exploratory ventures.

16 On its face, the blog posting linking Mr. Fodor to criminal and civilly
17 sanctionable matters which destroys his reputation for trustworthiness, is libelous *per*
18 *se* where it impugns Mr. Fodor personally in his profession.

19 Tazmanian's blog posting is further libelous where by implication and
20 innuendo, Tazmanian weaves Mr. Fodor's name into the criminal activities of Staub
21 when referring to Mr. Fodor by name in three places within the posting and once
22 again inferentially (when referencing “these individuals”).

23 Reasonable persons reading this message could clearly interpret and
24 comprehend this message in a manner that places Mr. Fodor hand-in-hand with
25 Staub in all criminal indiscretions that Tazmanian aptly associates with Staub.

26

27 **The Complaint Incorporates All Elements of**
an Action for Defamation Per Se

28 The Second Claim for Relief in the First Amended Complaint more clearly

1 defines the same claim brought in the original Complaint. This claim seeks redress
 2 for defamation *per se*.

3 Mr. Fodor's pleadings and supporting exhibit identifies the libelous publication.
 4 First Amended Complaint, paragraph 17 and Exhibit 1 thereto.

5 The Complaint identifies the offending statements relative to Mr. Fodor. First
 6 Amended Complaint, paragraph 18 and Exhibit 1 thereto.

7 The offending written statement on its face, is clearly offered factually rather
 8 than stated as mere opinion. First Amended Complaint, paragraph 21.

9 The offending statement references Mr. Fodor and implicates him as an aider
 10 in another's criminal fraud toward oil and gas investors. First Amended Complaint,
 11 paragraphs 17, 23, and Exhibit 1 thereto.

12 The Complaint asserts that the statement is false. First Amended Complaint,
 13 paragraphs 2, 15, 18, 21, 23-34, 46, 54.

14 The Complaint alleges that the statement is not privileged. First Amended
 15 Complaint, paragraphs 22, 24-26, 29, 46. Tazmanian's blog posting has no privilege
 16 attached to it when implicating Mr. Fodor in criminal and civil fraud activities where
 17 the allegations of such are fabricated and delusory. First Amended Complaint,
 18 paragraph 46.

19 Tazmanian's statement imputes a lack of fitness on Mr. Fodor' part to be
 20 trusted with investment funds for oil and gas endeavors. Tazmanian's statement
 21 accordingly, tends to injure Mr. Fodor's reputation both personally and in his
 22 profession. First Amended Complaint, paragraphs 15, 20, 21, 35, 38, 39, 41, 47, 49,
 23 52-55.

24 The Complaint identifies how Tazmanian's statement is published to third
 25 persons. First Amended Complaint, paragraphs 20, 22, 26, 27, 29, 41, 49.

26 The Complaint references the internet exposure of the published statement,
 27 where it is exposed to 1.5 Billion visitors daily within Google's search engine alone,
 28 and not taking into account the vast exposure the publication has elsewhere within

1 other internet search engines. First Amended Complaint, paragraphs 20, 27, 45.

2 The Complaint identifies Tazmanian's statement as the very first search result
 3 when one enters "Tim Fodor" to commence a "Google" search. First Amended
 4 Complaint, paragraphs 19, 45.

5 The Complaint alleges that Tazmanian's efforts to publish false statements of
 6 Mr. Fodor, amounts at a minimum, to negligence and gross negligence; the pleading
 7 incorporates all elements of a claim for negligence (the subject of which is addressed
 8 below). First Amended Complaint, paragraphs 16-36.

9 An action for defamation requires a plaintiff to prove four elements: "(1) a false
 10 and defamatory statement . . .; (2) an unprivileged publication to a third person; (3)
 11 fault, amounting to at least negligence; and (4) actual or presumed damages."
 12 (Internal citation omitted). *Clark County School Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. Adv. Op. 31, 213 P. 3d 496 (Nev. Aug. 6, 2009) ("Clark County
 13 School"). See, *Pope v. Motel 6*, 121 Nev. 307, 315, 114 P.3d 277, 282 (2005);
 14 *Lubin v. Kunin*, 117 Nev. 107, 111, 17 P. 3d 422, 425 (2001).

16 If the defamatory communication imputes a "person's lack of fitness for trade,
 17 business, or profession," or tends to injure the plaintiff in his or her business, it is
 18 deemed defamatory *per se* and damages are presumed. *K-Mart Corporation v. Washington*, 109 Nev. 1180, 1191 n. 7, 866 P.2d 274, 282 n. 7 (1993) (receded
 19 from, on other grounds by *Pope*, 121 Nev. at 316-17, 114 P.3d at 283); accord, *Clark
 20 County School*, 125 Nev. at ___, 213 P. 3d at 503.

22 Importantly, the Second Claim for Relief seeks redress for defamation *per se*
 23 and does *not* allege a claim for "business disparagement."

24 In Nevada the distinction between "defamation *per se*" and "business
 25 disparagement" is this: "A claim for defamation *per se* primarily serves to protect the
 26 personal reputation of an individual." *Clark County School*, 125 Nev. at ___, 213 P.
 27 3d at 504.

28 A claim for "business disparagement" seeks redress for injurious falsehoods of

1 an entity's goods or services.

2 The distinction is the basis for the difference between an
 3 action for defamation *per se* and an action for business
 4 disparagement. (Cite omitted). Unlike defamation *per se*,
 5 communications constituting business disparagement are
 6 not directed at an individual's personal reputation; rather
 7 they are injurious falsehoods that interfere with the
 8 plaintiff's business and are aimed at the business's goods
 9 or services. (Citation omitted). Thus, if a statement
 10 accuses an individual of personal misconduct in his or her
 11 business or attacks the individual's business reputation,
 12 the claim may be one for defamation *per se*; however, if
 13 the statement is directed towards the quality of the
 14 individual's product or services, the claim is one for
 15 business disparagement.

16 *Clark County School*, 125 Nev. at ___, 213 P. 3d at 504.

17 Tazmanian's offensive posting is defamatory *per se* where it targets Mr. Fodor
 18 personally, when falsely stating that Mr. Fodor, as a person, had, "*been involved from*
 19 *the beginning by aiding Paul Staub, Jr. thus perpetuating the fraud*," and where the
 20 statement infers further throughout the posting, that Mr. Fodor maintained a criminal
 21 association with Mr. Staub to defraud and "rip off" investors.

22 These statements clearly do not denigrate Mr. Fodor's services or successes
 23 in discovering oil and gas reserves which would serve to prove a "business
 24 disparagement" case. Rather, Tazmanian's statements involve a clear character
 25 assassination directed toward Mr. Fodor personally, which through surreal folly,
 26 viciously places Mr. Fodor in a criminal scheme to defraud investors interested in
 27 funding oil and gas exploratory efforts.

28 The blog posting is a personal attack on Mr. Fodor's moral fiber rather than his

1 successes as an oil and gas geologist. In turn, Tazmanian's statements destroy
 2 Fodor's capacity to attract investors for his oil and gas exploratory ventures because
 3 Tazmanian says inferentially and falsely that Fodor is a criminal and a cheat, and
 4 that he is aiding a "fraud," and that he is untrustworthy. Although Tazmanian says
 5 directly that Mr. Fodor is "perpetuating the fraud," the implied "between the lines,"
 6 unwritten message underlying the offensive blog message tells investors to exercise
 7 grave caution and that they should stay far away from Mr. Fodor.

8 Most offensive is the libelous publication is potentially exposed to Billions of
 9 persons daily. The posting remains prominently displayed on www.google.com,
 10 Google's "web search engine," as the very first listed item for a search of Mr. Fodor's
 11 name; and it continues in this most prominent position more than two years following
 12 the posting, even as of this writing. One needs only to place the words "Tim Fodor"
 13 in Google's search engine to confirm this phenomenon.

14

15 *The Complaint Incorporates All Elements of an*
Action for Negligence and Gross Negligence

16 The First Claim for Relief in the Amended Complaint more clearly defines the
 17 same claim brought in the original Complaint. Although styled "Gross Negligence,"
 18 this claim incorporates both negligence and gross negligence claims.

19 A prima facie claim for negligence consists of four elements: "(1) an existing
 20 duty of care, (2) breach, (3) legal causation, and (4) damages." *Turner v. Mandalay*
 21 *Sports Entm't, LLC*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008).

22 The Complaint, among other allegations, avers that the Defendants owed a
 23 duty to Plaintiff to refrain from publishing false, defamatory, libelous, outrageous,
 24 unprivileged matters of Plaintiff to third parties and also to refrain from falsely
 25 implicating Plaintiff in criminal behavior and acts of dishonesty. First Amended
 26 Complaint, paragraphs 16 - 25.

27 The Complaint clearly outlines breaches of these duties. First Amended
 28 Complaint, paragraphs 26 - 34.

1 The Complaint avers both causation and damages resultant of the
 2 Defendants' negligence. First Amended Complaint, paragraphs 35 - 36.

3 *The Complaint Incorporates All Elements of an Action
 4 for Intentional Interference With Prospective Advantage*

5 The Third Claim for Relief in the Amended Complaint more clearly defines the
 6 same claim brought in the original Complaint. This claim seeks redress for
 7 intentional interference with prospective advantage.

8 The claim for "intentional interference with prospective economic advantage"
 9 requires the following elements: "(1) a prospective contractual relationship between
 10 the plaintiff and a third party; (2) knowledge by the defendant of the prospective
 11 relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) absence
 12 of privilege or justification by the defendant; and (5) actual harm to the plaintiff"
 13 *Wichinsky v. Mosa*, 109 Nev. 84, 88, 847 P. 2d 727, 729-30 (1993).

14 The Amended Complaint alleges that Plaintiff maintained private, prospective
 15 contractual relationships with certain third persons and institutions who facilitated
 16 Plaintiff's oil and gas exploratory efforts, and that these relationships remained
 17 healthy prior to the Defendants' libelous publication over the internet. First Amended
 18 Complaint, paragraph 43.

19 The Amended Complaint alleges the defendants had knowledge of the
 20 Plaintiff's prospective economic relationships and knew the Plaintiff relied on them to
 21 sustain his oil and gas exploratory efforts. First Amended Complaint, paragraph 44.

22 The Amended Complaint alleges the Defendants published the libelous
 23 material intending to disrupt and harm those relationships. First Amended
 24 Complaint, paragraph 45.

25 The Amended Complaint alleges, "[T]here is no privilege or justification
 26 whatsoever on the defendants' part in falsely imputing criminal activity to the Plaintiff,
 27 in falsely imputing acts of dishonesty to the Plaintiff, and in falsely contending the
 28 Plaintiff aided another in a scheme to defraud investors" First Amended

1 Complaint, paragraph 46.

2 The Amended Complaint describes the Plaintiff's harm as the result of the
3 libelous publication. First Amended Complaint, paragraphs 47- 48.

4

5 **The Proposed Discovery Would Likely Lead to**
Identifying Information of the Defendant Tazmanian

6 Google, Inc. (Owner/Operator/Manager of Blogspot.com)

7 Plaintiff merely asks to discover from third parties, starting first with Google,
8 Inc., sufficient information to obtain the true identity of Tazmanian353 and his last
9 known location and contact information.

10 The request to Google would appear fruitful in obtaining Tazmanian353's true
11 identity where Google owns/operates/manages blogspot.com. Blogspot.com is the
12 location from where the libelous material against Mr. Fodor was disseminated by
13 Tazmanian353.

14 Presumably, Google maintains registration information on Tazmanian353
15 sufficiently to identify this individual. Plaintiff believes individuals could not place
16 postings on Blogspot.com unless they submitted registration information of
17 themselves to Blogspot, beforehand.

18

19 Yahoo! Inc. (Owner/Operator/Manager of Yahoo! Finance)

20 Yahoo! Inc. ("Yahoo") is the owner/operator/manager of Yahoo! Finance.
21 Yahoo! Finance is a service from Yahoo that provides financial information and
22 news. Tazmanian353 posted defamatory matter about Revolutions Medical on
23 Yahoo! Finance, according to the *Revolutions Medical* lawsuit (**Exhibit "8"**).

24 Presumably, Yahoo (or the owners/operators/managers of Yahoo! Finance)
25 maintains registration information on Tazmanian353 sufficiently to identify this
26 individual. Plaintiff believes individuals could not place postings on Yahoo! Finance
27 unless they submit registration information of themselves beforehand.

28

1 Interactive Data Corporation (Owner/Operator/Manager of RagingBull.com)

2 Interactive Data Corporation (“IDC”) is the currently known
3 owner/operator/manager of RagingBull.com. Raging Bull is a website offering
4 message boards to stock market investors and others interested in reading or posting
5 relevant information on various financial matters.

6 Tazmanian353 has been a frequent poster at this website. Raging Bull is
7 where Tazmanian353 posted alleged defamatory material against *Revolutions*
8 *Medical*, according to the *Revolutions Medical* Complaint. **Exhibit “9”** attached.

9 Presumably, IDC (or the owners/operators/managers of RagingBull.com)
10 maintains registration information on Tazmanian353 sufficiently to identify this
11 individual. Plaintiff believes individuals could not place postings on RagingBull.com
12 unless they submitted registration information of themselves to RagingBull.com,
13 beforehand.

14

15 Other Host/ISPs

16 Should the information received from Google and/or IDC be insufficient to
17 adequately identify Tazmanian353, but nevertheless lead to the identification of other
18 host/ISP type sources, in that event, Plaintiff asks permission to subpoena those
19 sources as well, seeking the same type information relative to Tazmanian353 as
20 would be sought from Google, blogspot, Raging Bull and/or IDC..

21

22 The Specific Discovery Requests Are Conservative and Limited

23 Specifically, Plaintiff asks permission to subpoena the corporate
24 representative(s) of Google, Inc. and/or Blogspot.com, Yahoo! Inc. and/or Yahoo!
25 Finance, IDC and/or RagingBull.com.

26 Should information obtained from those sources be insufficient to identify the
27 true identity of person posing as Tazmanian353, in that event Plaintiff asks

1 permission to subpoena the corporate representative(s) of other host/ISP operators
 2 identified in the process of obtaining information from Google, Blogspot, RagingBull
 3 and IDC.

4 Plaintiff requests the following methods of discovery: (1) for attendance at
 5 depositions in accordance with Fed.R.Civ.P. Rules 30(b)(6) and 45, of the corporate
 6 representative(s) of Google, Inc. and/or Blogspot.com, Yahoo! Inc. and/or Yahoo!
 7 Finance, IDC and/or RagingBull.com and perhaps other host/ISP operators as may
 8 be required, to testify to the following matters via deposition examination and to
 9 produce documents relative to the following matters:

- 10 1. Registration information for Tazmanian353, in possession of, or under
 11 control of the organizations and host/ISPs listed above (i.e. Google and
 12 Blogspot, Yahoo! and Yahoo! Finance, IDC and Raging Bull, and if
 13 necessary, other host/ISPs);
- 14 2. Name, address, telephone, fax, email and other contact information of
 15 Tazmanian353, in possession of, or under control of the organizations
 16 and host/ISPs listed above (i.e. Google and Blogspot, Yahoo! and
 17 Yahoo! Finance, IDC and Raging Bull, and if necessary, other
 18 host/ISPs);
- 19 3. Assignment, billing and payment information for Tazmanian353 (but
 20 excluding credit/debit card number, expiration date and security number
 21 information, and excluding banking information, and excluding Social
 22 Security number) in possession of, or under control of the organizations
 23 and host/ISPs listed above (i.e. Google and Blogspot, Yahoo! and
 24 Yahoo! Finance, IDC and Raging Bull, and if necessary, other
 25 host/ISPs);
- 26 4. Source IP addresses information for Tazmanian353, in possession of,
 27 or under control of the organizations and host/ISPs listed above (i.e.
 28

1 Google and Blogspot, Yahoo! and Yahoo! Finance, IDC and Raging
2 Bull, and if necessary, other host/ISPs);

3 5. Log files noting dates and times of activity by Tazmanian353, and to
4 whom the IP address for Tazmanian353 purportedly belongs, in
5 possession of, or under control of the organizations and host/ISPs
6 listed above (i.e. Google and Blogspot, Yahoo! and Yahoo! Finance,
7 IDC and Raging Bull, and if necessary, other host/ISPs);
8 6. Other source IP addresses through which Tazmanian353 has
9 registered or used, or with which he/she signed-on, when posting or
10 gaining access to the organizations and hosts/ISPs listed above (i.e.
11 Google and Blogspot, Yahoo! and Yahoo! Finance, IDC and Raging
12 Bull, and if necessary, other host/ISPs);
13 7. IP addresses for Tazmanian353 that the organizations and hosts/ISPs
14 listed above (i.e. Google and Blogspot, Yahoo! and Yahoo! Finance,
15 IDC and Raging Bull, and if necessary, other host/ISPs) have assigned
16 to others.

17 Should the court grant this Motion, Plaintiff anticipates issuing such
18 Subpoenas from this court for the attendance of such representatives at depositions
19 in locations within 100 miles from their respective corporate headquarters. Google is
20 in Mountain View, California, Yahoo! is located in Sunnyvale, California, and
21 Interactive Data Corporation is headquartered in Bedford, Massachusetts.

22 Upon receiving information Plaintiff considers sufficient to determine the real
23 or true identity of the Defendant John Doe a.k.a. Tazmanian353, at that point,
24 Plaintiff would cease further discovery efforts. At that time also, Plaintiff would ask
25 for permission to File a Second Amended Complaint substituting the true
26 name/identity of the individual known only as Tazmanian353, currently.

27 Plaintiff further requests permission to obtain the deposition of an individual
28

1 currently residing in Ohio whom, Plaintiff is informed and believes, has information on
2 the true identity of the person posing as Tazmanian353.

3

4 **CONCLUSION**

5 A reading of **Exhibit “3”** attached, demonstrates the clear desire of Mr. Fodor
6 to put a quick end to this matter without further litigation. Mr. Fodor sought every
7 means possible to avoid court intervention but to no avail. The terms Mr. Fodor
8 offered to Tazmanian353 were as follows:

9 Please permanently remove the blog posted
10 December 23, 2008 by Tazmanian at
Tazmanian353.blogspot.com.

11 * * *

12 A demonstration to my satisfaction that you
13 successfully removed the offending post
which includes Mr. Fodor's name would
cause us to shake hands and conclude the
matter. The case would be dismissed
without prejudice. No strings are attached.
14 It's that simple. If you desire a release,
15 that's fine so long as it is mutual.

Exhibit “3”

16 To date, there is no response from Mr. Hicks to this offer.⁷

17 For reasons stated, the requested relief is appropriate where the individual
18 causing the harm remains fictitious and elusive, where third parties likely have
19 information relative to the individual's true identity, and where the requested
20 discovery is conservative, limited and pointed solely to gain information sufficiently to
21 locate the fictitious individual and to substitute his/her real name in place of his/her
22 fictitious name, so the real person who authored and published the libelous material

23

24

25

26

27

28 ⁷ At least as of this writing, this same offer to Tazmanian remains viable so long
as the offensive posting with Mr. Fodor's name is immediately removed from
blogspot.com and elsewhere on the internet.

1 may be served with process in accordance with Fed. R. Civ. Pro. 4(e) and 4(m).

2 Respectfully, this 14th day of March 2011

3 LAW OFFICE OF GORDON M. COWAN

4 /S/

5 _____
6 Gordon M. Cowan, Attorney for
7 Plaintiff THOMAS F. FODOR

8 **Attachments:**

9 Exhibit 1: Blogger (Blogspot) terms
10 Exhibit 2: Correspondence Gordon Cowan to Google, Inc.
11 Exhibit 3: Correspondence Gordon Cowan to Mr. Hicks
12 Exhibit 4: Returned envelope (undeliverable) to Mr. Hicks (P.O. Box 681 address)
13 Exhibit 5: Mr. Jackson Bucher's Declaration
14 Exhibit 6: William Knestrick's letter to Hicks
15 Exhibit 7: Mr. Stephen Bucher's Declaration
16 Exhibit 8: *Revolutions Medical* Complaint
17 Exhibit 9: Hicks' Response to *Revolutions Medical* Complaint
18 Exhibit 10: Hicks' Response to his Deposition Appearance in *Revolutions Medical*
19 Declaration of Gordon Cowan
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